

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION**

SALEM HOSPITAL CORPORATION a/k/a THE
MEMORIAL HOSPITAL OF SALEM COUNTY¹

Employer

and

Case 4-RC-21697

HEALTH PROFESSIONALS AND
ALLIED EMPLOYEES (HPAE)

Petitioner

**REGIONAL DIRECTOR'S DECISION AND
DIRECTION OF ELECTION**

The Employer, Salem Hospital Corporation a/k/a The Memorial Hospital of Salem County, operates an acute-care hospital in Salem, New Jersey. The Petitioner, Health Professionals and Allied Employees (HPAE), filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent a unit of all full-time, regular part-time, and per-diem Registered Nurses (RNs) employed at the hospital, including Staff Nurses and Case Managers.²

The Employer contends that 44 RNs who serve as Charge Nurses (CNs),³ along with four Telemetry Unit CNs - April Cooksey, Ann Jennings, Christa Saracino, and Amanda D'Agostino

¹ The parties did not agree on the Employer's name. The Employer's counsel stated at the hearing that its correct legal name is "Salem Hospital Corporation." The Petitioner contends that the Employer is registered as a corporation under two names, "Memorial Hospital of Salem County" and "Salem Hospital Corporation," and holds itself out to the public as "Memorial Hospital of Salem County." The documents in evidence, including, inter alia, the organization chart, job descriptions, and leave request forms, identify the Employer as either "Memorial Hospital of Salem County" or "The Memorial Hospital of Salem County," and the Employer's website identifies the hospital as "The Memorial Hospital of Salem County."

² Neither party introduced any record evidence concerning the duties of Case Managers. Pursuant to the Board's Healthcare Rule, which, as discussed below, provides that a unit of all RNs is appropriate, and in the absence of any evidence showing that Case Managers should not be included with other RNs, they shall be included in the unit.

³ The Employer did not name the 44 RNs that it contends should be excluded, but stated that those names are listed in an exhibit that it introduced in the case. That exhibit listed the names of

- should be excluded from the Unit as supervisors.⁴ The Petitioner contends that none of the RNs who serve as CNs are supervisors within the meaning of the Act. According to the Petitioner, there are approximately 150 RNs in the petitioned-for unit, while the Employer states that there are about 132 RNs in this unit.

A Hearing Officer of the Board conducted a hearing, and the Employer and the Petitioner filed briefs.⁵ I have considered the evidence and arguments presented by the parties, and I find that the Employer has failed to sustain its burden to establish the supervisory status of the CNs other than two CNs in the Surgical Services Unit, Lois Strang and Lori Nardelli. Therefore, I shall direct an election pursuant to the petition.

all RNs, their total hours worked, their hours worked as CNs, and the percentage of hours that they worked as CNs, during the pay periods ending April 10, 2010 to May 22, 2010. In that exhibit, the RNs are listed in descending order of the percentage of hours they worked as CNs, and the Employer presumably seeks to exclude the first 44 nurses on this list. These nurses have CN hours ranging from 9.62 percent to 105.60 percent. The exhibit also lists eight RNs with CN hours ranging from 3.81% to 9.62% of their time, and numerous other RNs with zero CN hours. The names of the four Telemetry nurses that the Employer claims should be excluded as supervisors appear on the exhibit among those listed as having zero CN hours.

The Petitioner contends that this list is of questionable accuracy and should not be relied upon to demonstrate that any employee worked regularly as a CN. In view of the decision in this case that CNs other than Strang and Nardelli are not supervisors, it is unnecessary to determine whether the list is accurate.

⁴ The Employer took the position during the hearing that *all* RNs who acted as CNs for any period of time were supervisors within the meaning of Section 2(11) of the Act. The Employer modified its position in its brief, as set forth above.

⁵ During the hearing, the Employer filed a charge in Case 4-CB-10499 alleging that the Petitioner violated Section 8(b)(1)(A) and 8(b)(1)(B) of the Act by involving supervisory CNs in the filing of the petition. The Employer then presented the Hearing Officer with a motion to adjourn the hearing pending investigation of the charge, which the Hearing Officer denied. The Employer filed a Request for Special Permission to Appeal the Hearing Officer's denial of the motion. The Acting Regional Director for Region Four of the National Labor Relations Board issued an Order granting the Employer's Request for Special Permission to Appeal, but denying the appeal, finding that because the supervisory status of the CNs was critical to deciding both the unfair labor practice charge and the question concerning representation, proceeding with the hearing was the most efficient way to resolve this common issue. The Employer has not filed an appeal of the Acting Regional Director's ruling, and its charge was dismissed on July 2, 2010.

The Petitioner filed charges in Cases 4-CA-37522 and 4-CA-37521, charging, essentially that the Employer violated Section 8(a)(3) and (4) of the Act when its attorney allegedly threatened witnesses during the hearing. The Petitioner has subsequently filed several additional charges. The Region is currently investigating these charges, and the Petitioner requested to proceed with the processing of the petition notwithstanding the filing of its charges.

The Employer also filed a Motion to Transfer this case to another Region. The Motion was denied by the Hearing Officer. The Employer later filed a similar request to the Board's Acting General Counsel who denied it on July 27, 2010.

To provide a context for my discussion, this Decision will begin with a brief overview of the Employer's operations and then review the factors that must be evaluated in resolving the supervisory issue. Thereafter, the Decision will present in detail the relevant facts and reasoning that support my conclusion that most of the RNs who serve as CNs are not supervisors. Finally, the Decision will deal with several miscellaneous issues that arose during these proceedings.

I. OVERVIEW OF OPERATIONS

The Employer's hospital has about 80 operating beds on four floors in the following Units: Medical/Surgical and Pediatric, Women's Health, Telemetry, Surgical Services, Intensive Care (the ICU), and the Emergency Department. The Employer's Chief Nursing Officer is Pat Scherle, who is responsible for all of the nursing functions in the hospital. Unit Directors and House Supervisors report to her.⁶

Unit Directors are responsible for running their Units. They oversee the work of employees, address all clinical issues, handle staffing and hiring matters, evaluate and discipline employees, approve employee schedules, complete a variety of reports, attend hospital meetings, and handle administrative issues. They work primarily during the day, Monday through Friday, from around 8 a.m. to anywhere from 4 p.m. to 7 p.m., and they are available by cell phone and pager when not at the facility.

House Supervisors are responsible for everything that happens at the hospital during the evening and overnight hours during the week and on weekends, when they are generally the highest-ranking officials on site.

In the various Units, the hospital employs RNs, LPNs, Unit Service Assistants (USAs), and Unit Clerks. On every shift when RNs are working, one of them is designated as the CN for that shift in each Unit. Some RNs serve as CNs each time they work, while others do so only intermittently, and some RNs never serve as CNs.

Most full-time RNs work 12-hour shifts, 7 a.m. to 7 p.m. or 7 p.m. to 7 a.m., three days per week. There are part-time "Baylor" nurses who work only on weekends for 12-hour shifts, and there are some nurses who work 11 a.m. to 11 p.m. and/or 7 p.m. to 11 p.m. Some RNs work on a per-diem basis. At times, the Employer also uses nurses from outside agencies.

Unit Directors wear street clothes and lab coats, while RNs, including CNs, wear scrubs. Unit Directors have offices, unlike CNs and other RNs. Unit Directors are salaried, while RNs, including CNs, are hourly paid and punch a time clock.

⁶ In the record, Unit Directors are at times referred to as Department Directors, and House Supervisors are sometimes called Shift Supervisors.

The Petitioner does not seek to represent the Unit Directors or House Supervisors.

CNs are not authorized to hire, fire, permanently transfer, lay off, recall, suspend, promote, or reward employees. They receive a \$2 per hour wage differential when working as a CN. In addition to their CN duties, they provide direct patient care during their shifts.

II. FACTORS RELEVANT TO EVALUATING THE SUPERVISORY STATUS OF THE CHARGE NURSES

The burden of establishing supervisory status is on the party asserting that such status exists. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711 (2001); *Dean & DeLuca New York, Inc.*, 338 NLRB 1046, 1047 (2003). The party seeking to prove supervisory status must establish it by a preponderance of the evidence. *Dean & Deluca*, above at 1047. Section 2(11) of the Act sets forth a three-part test for determining whether an individual is a supervisor. Pursuant to this test, employees are statutory supervisors if: (1) they hold the authority to engage in any one of the 12 supervisory functions listed in Section 2(11); (2) their exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment; and (3) their authority is held in the interest of the employer. See *NLRB v. Kentucky River Community Care, Inc.*, above at 712-713; *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 573-574 (1994).

The statutory criteria for supervisory status set forth in Section 2(11) are read in the disjunctive, and possession of any one of the indicia listed is sufficient to make an individual a supervisor. *Kentucky River*, above at 713; *Juniper Industries, Inc.*, 311 NLRB 109, 110 (1993). The Board analyzes each case in order to differentiate between the exercise of independent judgment and the giving of routine instructions, between effective recommendation and forceful suggestions, and between the appearance of supervision and supervision in fact. The exercise of some supervisory authority in a merely routine, clerical, or perfunctory manner does not confer supervisory status on an employee. See *J.C. Brock Corp.*, 314 NLRB 157, 158 (1994); *Juniper Industries*, above at 110. The authority effectively to recommend an action means that the recommended action is taken without independent investigation by superiors, not simply that the recommendation ultimately is followed. See *Children's Farm Home*, 324 NLRB 61 (1997); *Hawaiian Telephone Co.*, 186 NLRB 1 (1970). The Board has an obligation not to construe the statutory language too broadly because the individual found to be a supervisor is denied the protection of the Act. *Avante at Wilson, Inc.*, 348 NLRB 1056 (2006); *Chevron Shipping Co.*, 317 NLRB 379, 381 (1995). Where the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, the Board will find that supervisory status has not been established, at least on the basis of those indicia. *Dole Fresh Vegetables Inc.*, 339 NLRB 785, 792 (2003); *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). The sporadic exercise of supervisory authority is not sufficient to transform an employee into a supervisor. See *Kanahwa Stone Co.*, 334 NLRB 235, 237 (2001); *Gaines Electric Co.*, 309 NLRB 1077, 1078 (1992).

In *Kentucky River*, above, the Court decided, contrary to the Board, that RNs at a residential nursing care facility were supervisors within the meaning of the Act. In determining that the nurses were not supervisors, the Board had found, inter alia, that while they directed the work of nurses' aides, this direction did not involve independent judgment because it was by

virtue of the nurses' training and experience, not because of their connection with management. The Court acknowledged that the term "independent judgment" is ambiguous with respect to the *degree* of discretion required for supervisory status and recognized that it was "within the Board's discretion to determine, within reason, what scope of discretion qualifies." 532 U.S. at 713. The Court rejected the Board's analysis, however, because the Board erroneously excluded, "ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards" from the statutory definition of independent judgment, even where the employees exercised a sufficient degree of discretion to otherwise warrant a supervisory finding. *Ibid.* In all other respects, the Court left intact the Board's traditional role in drawing the line between the performance of functions which are clerical and routine and assignment and direction that involve a sufficient element of discretion to confer supervisory status.⁷ Thus, the Court did not hold that every exercise of professional or technical judgment in directing other employees is necessarily an exercise of independent judgment, but recognized that the Board could determine the degree of independent judgment necessary to meet the statutory threshold for supervisory status. *Id.* at 714.

In a more recent series of cases, the Board clarified the circumstances in which it will find that individuals exercise sufficient discretion in performing two of the functions listed in Section 2(11) – assignment and responsible direction of work – to justify their classification as statutory supervisors. *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006); *Croft Metals, Inc.*, 348 NLRB 717 (2006); and *Golden Crest Healthcare Center*, 348 NLRB 727 (2006). As discussed in *Oakwood Healthcare*, the term "assign" refers to the "act of designating an employee to a place (such as a location, department or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee." *Oakwood Healthcare*, above at 689. In the health care setting, the term "assign" encompasses the responsibility to assign other employees to particular patients. *Ibid.*

In *Oakwood Healthcare*, the Board explained "responsible direction," as follows: "If a person on the shop floor has 'men under him,' and if that person decides 'what job shall be undertaken next or who shall do it,' that person is a supervisor, provided that the direction is both 'responsible . . . and carried out with independent judgment.'"⁸ "Responsible direction," in contrast to "assignment," can involve the delegation of discrete tasks as opposed to overall duties. *Oakwood Healthcare*, above at 691. But, an individual will be found to have the authority to responsibly direct other employees only if the individual is *accountable* for the performance of the tasks by the other employee. Accountability means that the employer has delegated to the putative supervisor the authority to direct the work and to take corrective action if necessary, and the putative supervisor faces the prospect of adverse consequences if the

⁷ The Court also indicated that, "the degree of judgment that might ordinarily be required to conduct a particular task may be reduced below the statutory threshold by detailed orders and regulations issued by the employer." *Id.* at 713-714.

⁸ In providing this explanation, the Board referred to statements made by Senator Flanders during the 1947 Senate hearings concerning the Act. At those hearings, Senator Flanders offered the amendment adding the phrase "responsibly to direct" to Section 2(11). See NLRB, Legislative History of the Labor Management Relations Act of 1947, 103-104.

employees under his or her command fail to perform their tasks correctly. *Oakwood Healthcare*, above at 692.

Assignment or responsible direction will, as noted above, produce a finding of supervisory status only if the exercise of independent judgment is involved. Independent judgment will be found where the alleged supervisor acts free from the control of others, is required to form an opinion by discerning and comparing data, and makes a decision not dictated by circumstances or company policy. *Oakwood Healthcare*, above at 692. Independent judgment requires that the decision "rise above the merely routine or clerical." Ibid.

III. FACTS

The duties and responsibilities of CNs in each Unit will be discussed in turn.

Medical/Surgical and Pediatric Unit

There are approximately 27 RNs in the Medical/Surgical and Pediatric Unit. Four full-time RNs, one of whom serves as CN, work on day shift, 7 a.m. to 7 p.m., and five full-time RNs, one of whom serves as CN, work on night shift, 7 p.m. to 7 a.m. There are also four Baylor nurses, two on each shift, and about 14 per-diem RNs in this Unit. There is one LPN on day shift, there are four LPNs on night shift, and no LPNs on weekends. The Unit has four USAs, three on day shift and one on night shift. There is one full-time Unit Clerk on day shift, one full-time Unit Clerk on a 3 p.m. to 11 p.m. shift, and two part-time relief Unit Clerks.

According to Unit Director Elaine Fowler, two RNs, Jean Ropiak (day shift) and Suzanne Miller (night shift) are the primary CNs, and they always act in this capacity when they are working. They each work three 12-hour shifts. For the other four days and nights, Fowler uses RNs Stacy Thomas on day shift and Linda Harmon on night shift to serve as CNs. Of the four weekend Baylor nurses, two, Brodie Davis and Quinetta Thomas, regularly act as CNs when they are present, and two others, Diane Rufts and Zif Bayutas, act in this capacity as needed. On occasion, other RNs have served as CNs, including Carol Brown, Victoria Whitehead, and Laurie Taylor. Fowler testified that other RNs also could work as CNs.

Fowler testified that every CN is responsible for the day-to-day operations of the Unit on his or her shift, and they all have the same duties and responsibilities. The CN is typically assigned to care for the pediatric patients, and he or she determines which nurse will care for each newly-arrived patient. The day-shift CN assigns patients for the night shift and the night-shift CN assigns patients for the day shift. This process takes 15 minutes or less. Fowler stated that RN patient assignments are often based on continuity of care; RNs retain their patients from day to day. CNs also attempt to equalize the workload of nurses by considering the "labor intensity" of each patient, i.e., how much work each patient requires. Fowler testified that a CN will try not to assign the most difficult patient to the same nurse all of the time.

RNs Quinetta Thomas and Suzanne Miller, who serve as CNs in this Unit, testified that assigning patients is a collaborative process. Patients are divided into A, B, and C teams, and different RNs are assigned to each team. The CN usually handles the C team. According to

Thomas and Miller, the RNs determine the patient assignments together, and an RN who is not acting as CN might fill out the assignment sheet. They both testified that the CN does not take into consideration the skill or ability of the other RNs when making the assignments because they believe all RNs are equally qualified. They further stated that although they have certain specific duties as CNs, such as checking the code cart and the refrigerator, they carry full patient loads and have not been told they are accountable for the work of others.

Fowler stated that CNs typically do not assign breaks or meal periods, but could intervene if necessary to assure coverage. Thomas and Miller testified that each nurse is responsible for obtaining coverage for his/her patients when they go on break; they have never denied a nurse a break, and they may not even be aware if a nurse is on a break.

Fowler testified that if it is necessary for a nurse in this Unit to be "floated" or "pulled" to work in another Unit, the CN could make the selection based on whether the available nurses are LPNs or RNs and whether they have necessary certification such as ICU certification. Normally, however, the decision as to which nurse leaves the Unit is determined by a rotation order which is maintained in a "pull book" on the Unit.

If additional staff is needed for the Unit, the CN can seek volunteers to come in to work, but a CN cannot compel a nurse to come in. While Fowler stated that the CN has the authority to ask an employee to come in to work without first checking with Fowler, she further stated that in her absence CNs have requested House Supervisors to permit them to bring in additional employees, and House Supervisors have denied those requests. CNs Thomas and Miller testified that if additional staff members are needed, they are required to call Fowler or the House Supervisor for permission to ask them to come in. According to Fowler, the CN does not have the authority to decide if someone should be sent home, even if the Unit is overstaffed.

Fowler has never disciplined a CN for the work of another employee and has not consulted with CNs concerning evaluations, but plans to do so in the future. Fowler stated that CNs can not give written warnings to employees but can counsel them. She cited the example of a CN who verbally counseled an LPN who had not performed an infusion in a timely fashion. No written warning was given to that employee. Thomas and Miller stated that they have never been told they have the authority to discipline employees, and while they may have reported problems with other employees to supervisors, any employee, whether a CN or not, may do the same.

Fowler also testified about a USA who complained several times that she was doing more work than another USA. Fowler stated that she expected the CN to resolve the issue.

Thomas and Miller have received no training as to how to serve as a CN and do not attend supervisory meetings.

Women's Health Unit

This Unit, which is located on the second floor of the hospital, includes a labor and delivery area, postpartum area, nursery, and a clinic for out-patients. The Unit has an all-RN

staff, and the RNs work either from 7 a.m. to 7 p.m. or 7 p.m. to 7 a.m. There are 10 full-time RNs, six per-diem RNs, and two weekend RNs. 11 of the 18 RNs rotate as CNs. They are Phyllis Tomlen, Sylvia Drennen, Jill Cottrell, Lynda Hitchner, Linda Sibley, Tina Kille, Renee Garrison, Betty Moore, Michelle Newsome, Marie Sunay, and Valarie Ranier. Three RNs, including one CN, generally work each shift, and one of them is assigned to each of three areas: labor and delivery, postpartum, and the nursery.

Unit Director Nancy Hampton testified that the CN is responsible for filling out the daily assignment sheet, which indicates which RN is caring for the patients in each area. She stated that when the CN comes to work she receives an updated copy of the patient census, which she uses to delegate which RN works in which area based on their skill level. Hampton stated that most of the RNs can work in all areas, and the CN does not have to consult with the RNs before making these assignments.

In contrast, Lynda Hitchner and Tina Kille testified that the RNs generally volunteer for the assignments they want and decide on these assignments in a collaborative manner. Hitchner further stated that any of the RNs can complete the assignment sheet, and Kille stated that she has never been told she has the authority to require other RNs to take a particular assignment.

Hampton stated that about once a week, a CN might need to move an RN from one area to another in the Unit and can do so without having to consult with her or any other supervisor. She further stated that the CN does not have to contact her if she needs an "on call" RN to come in to work. Hampton testified that if the Unit has a very low patient census, a CN may call a nurse and tell him or her not to come to work but to remain on call, but she did not indicate whether the CN could do so without the authorization of Hampton or the House Supervisor. Hitchner and Kille both stated that if they think additional staff is required during a shift, they must contact Hampton or the House Supervisor. They further stated that they have no independent authority to call in staff members or send them home.

Hampton testified that there is no need for CNs to direct the work of other RNs—they all "pick up for each other." Hampton described an incident when a CN told an RN to follow through with some work for a baby, but the nurse did not do it. The CN performed the necessary work herself and notified the supervisor. Hampton assumed, but was not certain, that the CN was aware that she could have been held accountable for the problem. She also mentioned that CNs fill out forms each day signifying that certain tasks have been done, such as checking the "crash cart."

Hitchner stated that CNs are personally responsible for checking the crash cart and the refrigerator. To her knowledge, no CN has ever been disciplined for the work of another employee. Hitchner and Kille stated that they have never been told they are accountable for the work of other employees when they act as CN, and they have never disciplined employees nor been told they have authority to discipline employees.

Hampton testified that she uses the hospital's RN evaluation form, called the "Position Description/Competency Based Evaluation Registered Nurses," for RNs who act as CNs. She does not use a CN evaluation form. She noted that the RN form rates employees, among other

things, on their ability to delegate tasks appropriately and to communicate effectively. Hampton testified that she has commented in a recent evaluation that a nurse "assigns appropriately, takes initiative [to] call in staff or cancel staff," and another nurse "bases her assignments on the skill of the staff."

Telemetry Unit

The Telemetry Unit is located on the second floor of the Hospital. According to Unit Director Shani Henderson, there are about 27 RNs, three LPNs, four Unit Clerks, six USAs, and four Telemetry Techs in this Unit. 15 RNs work full time, one works part time, five work on weekends, and six work on a per-diem basis. On day shift, there are approximately five RNs, two USAs, a Tech, and a Unit Clerk. Of the five RNs, one is designated as a CN. At night, there is a mix of four RNs and LPNs, a USA, and a Unit Clerk. One RN is designated as the CN. There are four regularly-designated CNs in this Unit, April Cooksey, Ann Jennings, Christa Saracino, and Amanda D'Agostino. If one of these four CNs is not present, another RN acts as CN. In addition to their Charge Nurse duties, CNs provide direct patient care.

Henderson testified that the CN from the prior shift fills out a whiteboard indicating which nurse cares for which patient on the oncoming shift. Throughout the day, the CN assigns newly-admitted patients to nurses on their shifts, but nurses at times may volunteer to care for new patients. Henderson stated that in assigning nurses to particular patients, the CN takes into account the patient's diagnosis, the nurse's capability, the nurse's workload, discharges throughout the day, and compatibility of patients in the same room.

CNs April Cooksey, Pamela Thomas and Ann Jennings testified that assigning the Unit's patients is a group effort. They stated that nurses care for the patients they had the day before and divide up the other patients based on their room locations. According to Jennings and Thomas, it takes about 10 minutes to complete the patient assignments. LPNs receive the same patient assignments as RNs because they are considered equally skilled, but they are not allowed legally to perform tasks such as "hanging blood" or giving intravenous medications, and they must obtain help from the RNs for these tasks. The CNs testified that after receiving a report on their patients from the prior shift CN, they begin patient care and perform certain tasks such as printing the patient census, doing narcotics counts, and checking the code cart.

The Unit Director or another supervisor may at times decide that a nurse needs to float to the ICU or the Medical/Surgical Unit and a pull book is used for this purpose. Henderson testified that agency nurses are sent to other Units first, then per-diem nurses are sent, and the remaining nurses are floated pursuant to a rotation. Henderson stated that if the CN could send an LPN instead of an RN to float, she would expect her to do so. The CN may ask a USA to sit with a patient or to take blood sugar readings or vital signs, but any nurse could do the same.

Henderson stated that for the last eight to twelve months, April Cooksey has prepared the six-week schedules for the Unit's nurses. She is the only CN who prepares the schedules. There is an "A" and "B" rotation which is used to schedule full-time staff for weekends and holidays. Henderson must approve this schedule, and she sometimes changes it to equalize employee workloads or because an employee asks her for time off. Henderson approves all nurses'

vacation requests and informs Cooksey of these requests, but when the schedule is prepared, employees inform Cooksey of their requests, and Cooksey uses this information to make up the schedule. If more than one nurse wants the same day off, Henderson makes the decision as to whose requests are granted. Cooksey testified that she does not use discretion in filling out the schedule because weekend and holiday work are determined pursuant to a set rotation, and she otherwise fills it out based on the employees' stated preferences. Cooksey volunteered to perform this function, receives no additional compensation for it, and spends less than 10 percent of her time doing it. She stated that she does not consider the skill of the individual nurses in making the schedule, but just ensures that five RNs or LPNs are scheduled for the day shift.

Henderson stated that the CN fills out a shift report at the beginning of the shift setting forth the nursing assignments and identifying the Unit Clerk, Telemetry Tech, and USAs for the shift. She indicated that there are occasions when CNs may reassign staff members to different patients during the shift without prior approval, such as if a patient becomes acutely ill and must be switched from an LPN to an RN. Thomas testified that employees other than the CN may fill out this report and the admissions list for new patients. She stated that newly-admitted patients are assigned to the nurse with the fewest patients.

Henderson testified that if the Unit patient census drops, the CN is supposed to inform her or the House Supervisor. Similarly, if the census increases, the CN is expected to call a supervisor to request more staff and to contact off-duty employees to come in. Unit Secretaries, Unit Clerks, and other RNs can also call staff to come in to work, but no one can compel employees to do so. According to Henderson, the CN can determine whether an RN, an LPN, or a USA is needed but must communicate this decision to the supervisor.

Thomas, Jennings, and Cooksey all stated that they have no authority to call in or call off staff without permission from Henderson or the House Supervisor, and their requests for additional staff have been denied by House Supervisors in the past.

Henderson testified that the CNs are not responsible for assigning or approving breaks or meal periods, but that she would expect them to ask an employee to wait a few minutes before leaving if the Unit is very busy. Both Thomas and Jennings stated, in contrast, that they often do not know when a nurse is on break and that nurses must make sure to get coverage for their patients themselves.

For employee misconduct, Henderson decides what discipline to impose, and no CN on the Unit has issued any written discipline. She provided one example of CN involvement with discipline in the Unit. A CN came to her and told her of some issues with a USA, one of which involved the USA entering temperatures into a patient chart without actually taking the patient's temperature. After speaking with some other nurses, Henderson placed the USA on a performance improvement plan. The CN was not involved in the discussion with the USA. As part of the performance improvement plan, Henderson required the USA to complete his assignment sheet at the end of each shift, have the CN sign to indicate that his tasks were done, and give the sheet to Henderson. Then, Henderson was to meet with the USA on a monthly basis. A CN has come to Henderson recently and said that she needs to have the "same conversation" with another USA.

Henderson admitted that staff members other than CNs have come to her with concerns about employees. Thomas, Jennings, and Cooksey all testified that they were never told that they were authorized to discipline employees, and they have never disciplined any employees.

Henderson testified that she uses a document titled "Position Description/Competency Based Evaluation CN" as a basis for evaluating CNs. She created this document herself; other Unit Directors testified that they do not use it. Among other things, the form lists the following duties: "Assists the nurse manager of the unit with daily staff assignments and work schedule for staff who are requesting time off from duty;" "May assist nurse manager with staff performance appraisals and competency evaluations;" "Supports and directs RNs with their assignments;" "Acts as a positive change agent assisting the nurse manager in coordination of unit compliance with Core Values and Standards of Conduct;" and "Takes responsibility for carrying out all expectations of Nurse Manager in his/her absence." Henderson stated that in preparing evaluations, she has asked CNs for information as to how employees are doing.

Henderson stated she also uses a document called "2N Telemetry Charge RN Competency Assessment" on which she verifies whether the CN is competent in the skills listed on the form. These skills include, among other things: "Knowledgeable in daily staff assignments with accurate and equal delegation of care;" "Knowledgeable in Assisting Director with staff scheduling;" "Knowledgeable in assisting with staff competency evaluations;" "Knowledgeable in communicating new protocols and policies to staff;" "Clinically supports and directs RN and LPN with their assignments;" "Demonstrates responsibility in reporting and follow up of 'Never Events';" "Maintains professional 2-way communication with staff, patients, family and physicians;" and "Demonstrates and reports staff discipline as needed and documents accordingly." The record includes one completed document, for CN April Cooksey dated January 2, 2009, and the Employer relies on this document to demonstrate that Cooksey was evaluated on supervisory responsibilities.

Surgical Services

Ralph Falvo, Director of Surgical Services, oversees all patient care activity for the Operating Room, Post Anesthesia Care, Same Day Surgery, Cardiac Cath Care, Endoscopy, and Central Sterile Processing areas. The Surgical Services Unit is on the ground floor of the hospital near the Emergency Room.

In the Operating Room, there are six full-time and three per-diem RNs, one Technician, and one Housekeeper. Of the nine RNs, Lois Strang is the CN each day, and there are two substitute CNs who fill in when she is on vacation.

For Same Day Surgery, there are eight full-time RNs, two part-time RNs, four per-diem RNs, one Surgical Suite Assistant, and three Certified Sterile Processing Techs. The CN for Same Day Surgery is Lauri Nardelli, and two substitute CNs fill in for her when she is not at work. According to Falvo, Strang and Nardelli each possess a wealth of knowledge and over 25 years of experience.

Falvo, who has only been in his position for about 10 months, often meets with Strang and Nardelli concerning planning, coaching, and team building for the Unit. When he first began, he interviewed four candidates for employment, who were sent by the Human Resources Department. He initially interviewed them by himself, then the two CNs came in to the interview. After the candidates left, Falvo asked for the CNs' input, and he later hired the candidates. Falvo stated that if the CNs had recommended against hiring a candidate, he probably would have hired the person anyway, although he would have taken their views into account. Strang and Nardelli assist with employee training, and the surgeons view them as leaders and go to them to resolve various issues.

Strang completes the six-week Operating Schedule. Falvo, who reviews the schedule before it goes out, described this task as fairly routine. Strang must schedule enough staff members to cover at least three Operating Rooms at a time. Regular employees sign up for their preferred shifts, and per-diem nurses call the CN to say when they are available. Strang tells Falvo if the Unit is short of employees and who she wants to bring in, and he approves these requests unless approval would result in employees working overtime. She also completes daily assignment sheets which are posted with the six-week schedule. Falvo mentioned that one surgeon is particular about who works with him, and Strang schedules his preferred RN and Tech for certain of his operations. Nardelli also prepares the daily assignment sheets and schedule for her area. Falvo testified that Strang and Nardelli look at the available employees and the types of surgeries they have the next day and consider the expertise and skill set of the staff members in making surgery assignments.

Surgeons sometimes seek to add procedures to the schedule in the Operating Rooms. In those cases, Strang discusses with them whether a room is available and what equipment is needed. She also calls vendors for needed equipment and helps prepare checklists of required tasks. According to Falvo, Strang can assign different nurses to audit different rooms and can assign the task of putting away equipment or supplies to an RN or a Tech. If a nurse is needed to deal with an emergency, Strang can ask a nurse to handle it, without Falvo's prior approval, even if the nurse is working on something else at the time.

Falvo has not disciplined Strang or Nardelli for the mistakes of other employees. On one occasion, an RN was upset with the way the call schedule was set up and discussed the matter with Strang. They could not resolve the issue, and Falvo later worked out a resolution. No other CNs in this department have the same level of authority as Strang and Nardelli.

On the morning of surgery, if an employee calls and indicates that he or she will not be coming to work, Strang can contact a replacement employee without having to wait for Falvo to come in. If a fourth room is needed for surgery, Strang will find a team to come in to work in that room without Falvo's prior approval. Falvo stated that Strang "puts out fires" in the Operating Room; if a physician is upset about something, he or she initially contacts Strang and if she can't handle the matter, she calls Falvo. If employees are needed in other areas, such as to sit with patients, Falvo will call the CN and ask if she can spare an employee and let him know later which employee she selected. Falvo stated that when the Unit is overstaffed, it is understood that agency employees go home first, then per-diem employees, then part-time employees, and lastly full-time employees, who take turns. The CN will determine when the

employee can leave and will then inform Falvo. According to Falvo, Nardelli has similar duties to Strang.

Intensive Care Unit

Kathy Orton is the Director of the ICU, which operates 12 beds for 24 hours a day. Employees in this Unit work two 12-hour shifts. Normally, there are between two and four RNs, including one CN, on both day and night shifts, as well as one USA and one Unit Clerk.⁹ There are no LPNs. During the day, the full-time CNs are Meghan Myers and Joann Williams, and Dawn Mason is the CN on night shift. Orton testified that when the full-time CNs are not present, approximately 13 of the 21 RNs in the Unit rotate in this position and they have the same responsibilities as the full-time CNs. ICU nurses are required to hold a number of certifications, including basic life support, advanced cardiac life support, and critical care.

Orton stated that the CN from the earlier shift gives a full Unit report to the newly-arriving CN, and the CN makes patient assignments based on the acuity of the patients and the competency of the nurses, especially if a nurse on the Unit is a floater who is not a certified critical care nurse. Orton is not normally present when assignments are made. For continuity of care, nurses are generally assigned to the same patients they had the day before. On days where the acuity of the patients changes, Orton expects that the CN will change the assignments as needed. She stated that on one occasion, a Telemetry Unit nurse who had been temporarily assigned to work in the ICU had a patient who went into cardiac arrest, and the CN reassigned the patient to a regular ICU nurse. Orton estimated that such changes occur about one to three times a month. If it is necessary to float an employee out of the Unit, the CN uses a rotation system, maintained in a pull book, to determine which employee to select. Orton stated that she expects that the CN might not always adhere to the rotation, because of patient acuity and the census in the Unit.

The ICU CNs' testimony differed from Orton's to some extent as to patient assignments. Myers and Mason stated that after receiving a report from the CN on the previous shift, the CN and the other nurses decide collaboratively who will care for which patient. Generally, if a nurse cared for a patient the prior day, he or she will work with that patient again. Myers asks the nurses who would like three patients, rather than two, and who is willing to take a new admission. Mason gives the other nurses the patients they previously cared for and splits the remaining assignments to balance the workload among the nurses. She stated that the nurses discuss the assignments together, and she then writes the assignments on the whiteboard and the nurses each receive a report on their individual patients. Both nurses stated that the assignment process usually takes about five minutes. Myers testified that assignments are not usually changed in the ICU, but any changes are made pursuant to a group decision. With respect to the example provided by Orton, Myers testified that the Telemetry nurse requested the reassignment when her patient was in cardiac arrest, and another nurse volunteered to take over. Myers stated further that once the nurses have completed their orientation in the ICU, they should be able to handle all assignments, and both she and Mason stated that they consider the ICU nurses equally qualified and they do not take into consideration their skills and abilities in making assignments.

⁹ There are no Unit Clerks after midnight.

She further testified that she has never been told she has the authority as CN to require other nurses to accept patient assignments.

Orton stated that full-time CN Joann Williams completes the schedule for day shift, and a rotating CN, Karen Martin, does the night schedule. Orton referred to the process as "self-scheduling;" employees make known what shifts they want to work, and the CNs attempt to assign the right number of RNs and LPNs for the patient census. Myers and Mason confirmed this process and stated that CNs may not grant time off to employees for sickness or vacation.

According to Orton, the CNs seek her approval to bring in staff outside the staffing guidelines of the ICU, but if they know they need more employees because of patient acuity they have the authority to call employees in to work. She cited the example of CN Williams contacting an employee to come in when another employee had been pulled from the ICU. Williams told Orton about this change when she arrived at work that morning. Myers and Mason testified, however, that when serving as CN, they must ask a supervisor whether they can bring in more employees, and supervisors have denied some of their requests for additional help. Orton stated that when a nurse is called in to work, the CN is responsible for changing patient assignments to equalize workload. According to Orton, the CN is supposed to complete a daily checklist, documenting that equipment and narcotics, among other things, have been checked, but this form is not always completed and the duties can be delegated.

Orton testified that Charge Nurses cannot send employees home without speaking to her or the House Supervisor. In making such decisions, they would probably look at such factors as the acuity of the patients, the nurses' skill, and who is close to working overtime. Additionally, they may make the decision by sending home per-diem nurses before part-time and full-time nurses. Myers and Mason stated simply that they do not have the authority to send employees home.

The record includes a July 19, 2006 employee disciplinary action notice to a CN, signed by Orton, for "substandard work, unprofessional conduct, and attitude." The notice states in relevant part:

"Multiple complaints from other departments and coworkers regarding rudeness, negative attitude, decreased teamwork, constant personal phone calls and personal email use that has been interfering with patient care responsibilities. Unprofessional attitude and foul language has also been noted both at the nurses' station and in the [patient] rooms. An increase of inaccurate/incomplete documentation of CN responsibilities such as refrigerator temps. signed off in the charge log that have not been completed, expired meds in fridge that are signed off as having been checked, etc."

Orton could not recall if any employee was disciplined for failing to perform the refrigerator checks.

The Employer provided a single example of CN involvement in discipline in the Unit, a January 9, 2005 employee Disciplinary Action Notice to a nurse for watching a movie at the nurses' station. Orton prepared and signed the Notice as "Supervisor/Counselor," and Shani Henderson, the CN that night, signed and dated the document at the bottom. The Notice indicates that the Nursing Supervisor reported the incident, which was also observed by the CN and other staff members. Orton also stated that CNs have the authority to issue verbal discipline.

Myers and Mason testified, however, that they have never been informed that they have authority to discipline employees as CNs, and they have not disciplined any employees. Further, they have never been told that they are held accountable for the work of other employees, and they have never been disciplined for the work of other employees.

Emergency Department

The Emergency Room is divided into two areas—the Main area for acute patients and the Fast Track area for the others. The Director of the Emergency Department is Barbara Taubenberger. Emergency Room employees work 7 a.m. to 7 p.m. and 7 p.m. to 7 a.m. shifts as well as an 11 a.m. to 11 p.m. Fast Track shift. Four to five RNs, including one CN, work on the day shift, and three to four RNs, including one CN, work the night shift. The full-time CNs are Donna Akers, Laurie Leronetti, Sue McCallister, and Chris Dick. On weekends, Christi Madden, a Baylor nurse, serves as CN. The other nurses, Tracy McCallister, Deb Ciervo, Kathy Bell, Dodi Baldwin, and Ashley D'Orazio, occasionally rotate as CNs.¹⁰ Taubenberger decides whether each nurse will work in the Main area or Fast Track area of the Emergency Room. The CN typically performs triage work for patients. If a patient dies, the CN contacts the Medical Examiner and the physician in charge of the patient, among others.

Taubenberger stated that the CN decides which nurse to assign to which patient and that when patients come into the Emergency Room by ambulance, the CN decides in which room to place them. Patients can also come into the Emergency Room on their own, and the CN performs triage, determines their level of acuity, and decides where to place them. Taubenberger stated that the CN would not assign a new, less-qualified member of the nursing team to a very sick patient without backup from a more experienced CN. She asserted that the CN should make sure the Emergency Department is flowing efficiently and should be aware of the status of each patient. If the CN is triaging one patient, she may ask another nurse to triage another patient. The CN, as well as the primary nurse for the patient, can ask LPNs to perform tasks as needed.

CNs Tracy McAllister and Donna Akers testified that Taubenberger has not been present during discussions when nurses are assigned patients at the beginning of their shifts. McAllister, who has worked as a CN on the night shift, stated that three or four nurses, including the CN, collaborate in making assignments. When they arrive at 7 p.m., they decide which nurses will work in the various sections. Akers, a CN on the day shift, stated that after clocking in, she checks the clock box, the crash carts, and the defibrillators, and receives a report from the CN on

¹⁰ There was testimony indicating that these nurses serve as CN for less than 20 percent of their time, but an exhibit introduced into evidence by the Employer indicates that they did not serve as CN at all during the relevant time period.

the previous shift informing her of the patient census and whether any patients will be transferred out of the Department. She stated that she and the other two or three nurses are usually present at this time, and they select the assignments they want and listen to reports on the status of the patients together. After completing equipment checks, Akers routinely takes the triage assignment. She stated that while the triage nurse assesses incoming patients and is responsible for patients in the waiting area, some patients who arrive by ambulance may be assigned to a bed by another nurse, but the assignment will be entered into the computer so the CN will know where the patient is located. While Taubenberger stated that a CN occasionally might transfer a nurse temporarily from the Main to the Fast Track area or vice versa if an area is particularly busy, Akers stated that the decision to change a patient assignment would be made by Taubenberger, not the CN. She further testified that if a nurse calls out prior to the start of the shift or gets sick during the shift, she would call Taubenberger or the House Supervisor. When the patient census increases, Taubenberger decides whether additional staff is needed. Emergency Room Nurses are never sent home.

CNs have not issued any employee written discipline. If a Tech is not performing properly, Taubenberger will ask a CN to observe him or her, but she has not disciplined a CN for the poor performance of another employee. McAllister and Akers stated that no one has ever told them they have the authority to discipline employees or that they are held accountable for the work of other employees when they serve as CNs. Taubenberger, who has been in her position for about one year, stated that she has consulted with two or three CNs before giving four employees their 90-day evaluations, but the CNs do not attend the employees' evaluation meetings.

IV. ANALYSIS

The Employer contends that the CNs exercise sufficient independent judgment in assigning work, responsibly directing subordinates, disciplining and evaluating employees, and adjusting employee grievances, to establish that they are supervisors within the meaning of the Act. However, as discussed below, the Employer has not met its burden to demonstrate that the CNs meet the Board's test for supervisory status as to any of these Section 2(11) indicia, with the exception of CNs Lori Strang and Lois Nardelli, who use independent judgment in assigning work. I find, therefore, that the Employer has failed to establish that the other CNs are supervisors within the meaning of Section 2(11) of the Act.

A. Assignment of Work

While the CN and RN Competency Assessment and Position Description/Competency Based Evaluation forms list skills, criteria, and comments suggesting that CNs use discretion in assigning work, it is settled that paper authority is not sufficient to confer supervisory status; there must be evidence of actual performance of supervisory functions. *RCC Fabricators, Inc.*, 352 NLRB 701, 711 fn. 23 (2008); *Golden Crest Healthcare Center*, above, 348 NLRB at 731. Accordingly, to determine whether the CNs are supervisors, it is necessary to analyze how they actually carry out their responsibilities.

A function performed by the Employer's CNs within *Oakwood Healthcare's* definition of "assign" is their designation of other nurses to care for particular patients. The Board held in *Oakwood Healthcare*, however, that it will find supervisory status only where patient assignments involve the exercise of independent judgment and are not clerical or routine.

For the most part, patient assignment at the hospital does not involve independent judgment. The assignment process takes as little as five minutes and no more than 15 minutes. Several Unit Directors testified generally that they expect the CNs in their Units to take into account factors such as the skills and experience of the nurses and the acuity and needs of the patients. However, the Unit Directors are not physically present during the assignment process, and the CNs from all Units other than Surgical Services testified as to how the assignment process works in practice. They stated, in general, that in assigning patients, they consider the nurses in their Units to be equally qualified, which obviates the need to take nurses' skill and patient acuity into consideration. The CNs further testified that the nurses generally meet and decide among themselves which nurse should care for which patient, and they indicated that continuity of care, equalization of workloads, room location, and nurse preferences are the main criteria. In the Medical/Surgical and Telemetry Units, the day-shift nurses assign patients for the night-shift nurses and vice-versa. In most Units, the CNs carry a full patient load in addition to performing certain administrative tasks such as checking crash carts and completing paperwork.

Employee collaboration on assignments suggests that no individual in the group is assigning work using his or her discretion. *Chrome Deposit Corp.*, 323 NLRB 961, 963 (1997). Assignments based on task location and workload equalization are essentially clerical decisions that do not establish independent judgment. *Royal Health and Rehab Center, Inc.*, 354 NLRB No. 71, at JD slip op. at 6-7 (2009); *Oakwood Healthcare*, above at 697; *Quality Mechanical Insulation, Inc.*, 340 NLRB 798, 801 (2003). Thus, other than in the Surgical Services Unit, the CNs' assignment of nurses to patients at the hospital does not require independent judgment, and supervisory status cannot be found based on these assignments.¹¹

Similarly, the assignment of newly-arriving patients to nurses does not indicate supervisory status. Telemetry Unit CNs Jennings and Thomas stated that these assignment are based on which nurse has the fewest patients, and if all have the same number, patients are assigned randomly. Further, any nurse or Unit Clerk can assign a new admission.

ICU CN Meghan Myers testified that patient assignments are not usually rearranged during a shift, but if so, the nurses make the decision as a group. The sole example of a reassignment during a shift in ICU occurred at a nurse's request when her patient went into cardiac arrest, and her replacement, according to Myers, was not assigned by the CN but was a volunteer.

¹¹ At best, the Employer can argue that the evidence is in conflict as to whether the CNs assign patients based on their independent assessment of nursing skills and patient acuity. The Board will not find supervisory status in the face of such a conflict in testimony. *Dole Fresh Vegetables Inc.*, 339 NLRB 785, 792 (2003); *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989).

Several CNs prepare schedules for the nurses in various Units. However, their role in scheduling is basically routine and clerical. They follow Unit guidelines concerning the number of licensed nurses required on each shift, and they account for weekend rotations and the nurses' stated preferences. All schedules must be approved by the Unit Directors, who change them as needed. I therefore do not find that these CNs exercise independent judgment in performing this scheduling function. See *Alstyle Apparel*, 351 NLRB 1287, 1298 (2007); *Sheraton Universal Hotel*, 350 NLRB 1114, 1127 (2007).

The record does not demonstrate that the CNs use independent judgment in assigning breaks. Several Unit Directors testified that a CN may assign, modify, or even cancel an employee's break if patient needs require the employee's presence, but there are no examples of the use of independent judgment in making these decisions. In general, the evidence indicates that changes in breaks may be required by the obvious, immediate needs of the patients, and that either the CN or the involved employee could make this decision; the CN's role, if any, is simply to ensure that there are enough nurses on the floor to care for the patients. Thus, in those Units where CNs play a role in scheduling employee meals or breaks, it is a simple and routine decision, not requiring independent judgment. *Youville Health Care Center, Inc.*, 326 NLRB 495, 496 (1998); *Azusa Ranch Market*, 321 NLRB 811, 812 (1996). See also *Loyalhanna Care Center*, 332 NLRB 933, 935 (2000).

There is insufficient evidence to show that CNs use discretion to float employees out of the Unit, call employees in to work, or send employees home. While several Unit Directors testified that CNs could decide which employee to float based on their judgment as to what is best for the patients, in practice that decision is normally based on a rotation system which is recorded in a pull book. Decisions to send nurses home or call them in to work are made by the Unit Director or House Supervisor; the CNs all testified that they may not make these decisions independently. Indeed, Unit Director Fowler testified that CN requests for additional staff have been denied by House Supervisors. These decisions are often based on obvious factors such as sending home agency and per-diem nurses before full-time nurses. Although several Unit Directors stated that the CNs in their Unit could *request* employees to come to work without prior approval, CNs cannot *require* them to come into work, so supervisory status cannot be established on this basis. See *Golden Crest Healthcare Center*, above at 729; *Heritage Hall, E.P.I. Corp.*, 333 NLRB 458, 459 (2001). Thus, with respect to the vast majority of CNs, the Employer has not met its burden to demonstrate that they assign work within the meaning of Section 2(11) of the Act.

However, unlike in the other Units, the two full-time Surgical Services Unit CNs, Lois Strang and Laurie Nardelli, use independent judgment in assigning patients. The undisputed testimony of Unit Director Falvo shows that these CNs consider employee skill and ability as a factor in making assignments in the Surgical Services Unit. Therefore, based on their assignment of patients to other nurses, I find them to be supervisors and shall exclude them from the unit on this basis. I will not exclude the other RNs in the Surgical Services Unit who at times serve as CNs, because Falvo testified that Strang and Nardelli have significantly greater authority than the CNs who fill in for them. Moreover, the Employer has failed to establish that any of the substitute CNs serve in this capacity on a substantial and regular basis. *Oakwood Healthcare*, above at 698-699.

B. Responsible Direction

As stated above, the Board defines "direction" as deciding which employee should perform which task in which order, determining the manner in which work is performed, and having the authority to take corrective action if the work is not done properly. *Oakwood Healthcare*, above at 691; *Golden Crest Healthcare Center*, above at 730. In this case, the Employer asserts that when, for example, ICU CNs ask USAs to perform certain functions such as taking vital signs and blood sugar readings, retrieving equipment, or other tasks, they are responsibly directing the aides. However, any nurse, not only a CN, may request that aides perform such functions. Moreover, even if CNs "direct" aides, this does not end the inquiry. Supervisory status will be found only if the direction is "responsible" and involves the exercise of independent judgment. *Oakwood Healthcare*, above at 691; *Golden Crest Healthcare Center*, above at 730. In this case, there is insufficient evidence to show that the assignment of basic tasks, such as those listed, requires independent judgment.

The evidence is also insufficient to show that CNs' direction of other employees is "responsible." In order for direction to be responsible, the asserted supervisor must be held accountable for the work performed by subordinates and be subject to adverse consequences if the work is not done properly. *Oakwood Healthcare*, above at 692. The Employer provided only one arguable example of a CN receiving discipline for the performance of other staff members - the written warning given to an ICU CN in 2006 for numerous infractions, including rudeness, negative attitude, inadequate teamwork, and constant personal phone calls and email use. The Employer emphasizes that the CN was also cited for inaccurate/incomplete documentation on a "charge log" and contends that this warning establishes that the Employer held the CN accountable for the work of other employees. However, this warning was based primarily on the CN's personal conduct, not the conduct of other employees, and even viewed in a light most favorable to the Employer, this single four-year-old warning appears to be an isolated event insufficient to demonstrate that the CNs' direction of other employees is "responsible." See *Kanawha Stone Co.*, above 334 NLRB at 237. Although some Unit Directors rate CNs using evaluation forms that arguably suggest accountability for other employees' work, there is no evidence that these evaluations have had any effect on the CNs' compensation or can result in adverse consequences for the CNs. For a showing of accountability, the Board requires "evidence that an asserted supervisor's terms and conditions of employment have been actually affected by her performance in directing subordinates." See *Golden Crest Healthcare Center*, above at 731. Moreover, all of the CNs who testified at the hearing stated that they have never been informed that they are held accountable for the actions of any other employees.

In short, the Employer has failed to show that CNs use independent judgment in assigning tasks or are held accountable for the work done by subordinates and might suffer adverse consequences if that work is not done correctly. I thus find the evidence insufficient to establish that CNs responsibly direct other employees. *Oakwood Healthcare*, above at 695; *Golden Crest Healthcare Center*, above at 731-732.

C. Discipline

It is well established that, in order for discipline issued by a Charge Nurse to confer supervisory status, the discipline must lead to personnel action without independent investigation or review by other management personnel. *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002); *Beverly Health and Rehabilitation Services, Inc.*, 335 NLRB 635, 664 (2001), *enfd.* in pertinent part, 317 F. 3d 316 (D.C. Cir. 2003). In this case, the CNs who testified stated that they have never been told by the Employer that they have any disciplinary authority. The only evidence of discipline signed by a CN is a written warning given to an employee who watched a movie at the ICU nurses' station in January of 2005. The warning was written and signed by ICU Unit Director Orton, and Shani Henderson, the CN in that Unit at the time, also signed it. However, the incident was originally reported by the Nursing Supervisor, and there is no evidence that Henderson played any role in making the decision to issue the discipline.

There were two other disciplinary-related matters in which CNs played a role. Based on a report from a CN to a Unit Director, a USA in Telemetry received a performance improvement plan because he entered temperatures into a patient's chart without actually taking the patient's temperature. The Unit Director prepared the performance improvement plan, which required, among other things, that the USA perform all assigned duties and the CN sign a document showing that the USA completed his tasks. Although the CN initially reported the problem, the Unit Director used her discretion to determine that discipline was warranted and the level of discipline to impose.

Medical/Surgical Unit Director Fowler also testified that CNs have the authority to counsel employees, and ICU Director Orton stated that CNs may issue verbal discipline, but there is no evidence that verbal warnings and counselings are of any real consequence to employees or play any role in a progressive discipline system. Additionally, Fowler testified that a CN spoke to an LPN who did not perform an infusion in a timely manner and explained the expectations for her performance. There was no evidence, however that any other consequences resulted from this discussion.

The testimony and documentary evidence suggest that the CNs' role is generally limited to a recitation of facts or observations regarding employee conduct. There are no documents that contain any CN recommendations regarding discipline and no testimony that any CN ever issued discipline or effectively recommended discipline that was later imposed on an employee. On the whole, the evidence reflects a reportorial role by the CNs, and mere reporting of improper conduct does not establish supervisory status. See *Franklin Home Health Agency*, above at 830; *Williamette Industries*, 336 NLRB 743, 744 (2001).

Based on the foregoing, I find that the Employer has not met its burden to demonstrate that CNs have the authority to discipline or effectively recommend discipline of employees.

D. Evaluations

D. Evaluations

The authority to evaluate employees is not one of the Section 2(11) indicia of supervisory status. *Elmhurst Extended Care Facilities, Inc.*, 329 NLRB 535, 536-537 (1999). When an evaluation does not by itself affect the wages and/or job status of the employee being evaluated, the individual preparing such an evaluation will not be found to be a statutory supervisor on the basis of the evaluation. *Franklin Home Health Agency*, above at 831; *Harborside Healthcare*, 330 NLRB 1334 (2000). The Board has held that nurses are statutory supervisors based on the authority to evaluate only when there is a direct correlation between the evaluations and pay increases for the evaluated employees. *Trevilla of Golden Valley*, 330 NLRB 1377, 1378 (2000); *Hillhaven Kona Healthcare Center*, 323 NLRB 1171 (1997).

The CNs at the Employer's hospital have never been asked to prepare written evaluations of any employees. Although several Unit Directors stated that they had consulted with CNs in the past or planned to do so in the future, the Employer did not provide any details of these discussions or how they affected or will affect the evaluations. Therefore, the Employer's CNs are not statutory supervisors based on any role they play in evaluating subordinates.

E. Adjustment of Grievances

The Employer presented only scant evidence in support of its assertion that CNs adjust grievances. Specifically, Medical/Surgical Unit Director Fowler testified that a USA complained that she was doing more work than another USA, and Fowler stated that she would expect the CN to resolve the issue. Additionally, Surgical Services Director Falvo testified that an RN was dissatisfied with the call schedule, and the CN met with her about it but failed to resolve the matter, so Falvo resolved it. There is a "problem ID" procedure where any employee can submit a problem or issue to their Unit Director, but there is no evidence that CNs play any role in this procedure. Accordingly, based on the paucity of evidence that the CNs adjust employee grievances, I find that the Employer has not established this indicium of supervisory status. *Royal Health and Rehab Center, Inc.*, above, JD slip op. at 8-9; *Ken-Crest Services*, 335 NLRB 777, 779 (2001).

Considering all of the above, the Employer has not met its burden to establish that its CNs other than Strang and Nardelli are supervisors within the meaning of the Act. Therefore, I shall direct an election in the petitioned-for unit.

V. MISCELLANEOUS ISSUES

Per-Diem Nurses

In *Davison-Paxon Co.*, 185 NLRB 21 (1970), the Board set forth a formula to determine the regularity of part-time employment, i.e., whether the employee worked an average of four or more hours a week in the calendar quarter preceding the eligibility date. The Employer objects to the inclusion of per-diem RNs in the unit, contending that the *Davison-Paxon* eligibility formula "is arbitrary and unsupported by the Act," and there is no evidence concerning hours worked by the per-diem nurses.

The Board has generally continued to use this formula unless the circumstances of the case warrant using a different standard, such as when the employment of part-time employees is not regular or consistent. See e.g., *Arlington Masonry Supply, Inc.*, 339 NLRB 817, 819 (2003); *Sisters of Mercy Health Corp.*, 298 NLRB 483 (1990). Compare *Marquette General Hospital, Inc.*, 218 NLRB 713 (1975). In this case, each Unit Director whose Unit employs per-diem RNs testified as to how many per-diem nurses work on each shift, and exhibits submitted by the Employer show that all but a few of the nurses at the hospital work more than four hours per week. The Employer has not proposed a preferable alternative standard in this case, and none is apparent. Accordingly, the *Davison-Paxon* formula shall be applied to determine the eligibility of the per-diem nurses.

The Board's Healthcare Rule

At the hearing, the Employer moved to dismiss the petition based on its contention that the Board's Healthcare Rule is inconsistent with Section 9(c)(5) of the Act, and the Employer renewed this contention in its brief. The Board's Healthcare Rule, which was approved by the Supreme Court in *American Hospital Assn. v. NLRB*, 499 U.S. 606 (1991), provides that, except in "extraordinary circumstances" or where there are existing nonconforming units, the following units are appropriate in an acute-care hospital: (1) all registered nurses; (2) all physicians; (3) all professionals except for registered nurses and physicians; (4) all technical employees; (5) all skilled maintenance employees; (6) all business office clerical employees; (7) all guards; and (8) all nonprofessional employees except for technical employees, skilled maintenance employees, business office clerical employees, and guards. See 54 Fed. Reg. 16336 et seq., 284 NLRB at 1580 (1989). Section 9(c)(5) states, in pertinent part, that: "In determining whether a unit is appropriate . . . the extent to which the employees have organized shall not be controlling."

In its brief, the Employer did not, indicate why the petitioned-for RN unit in this case is inappropriate nor propose an alternate unit. Moreover, the Employer did not seek to introduce evidence as to the extent to which its employees have organized. The Employer presented no new arguments in support of its Section 9(c)(5) argument in this case, but only attached a brief to the United States Court of Appeals for the D.C. Circuit in a previous case, which involved another employer. *Alta Vista Regional Hospital*, 352 NLRB 809 (2008). In the decision underlying that case, the Board denied the employer's request for review of a Regional Director's decision that rejected the employer's Section 9(c)(5) argument. The Board later adopted a Hearing Officer's recommendation to overrule the employer's objections to the election, which again raised the Section 9(c)(5) argument. Thus, the Board has already considered the Employer's Section 9(c)(5) argument and found it to be without merit. Therefore, the Employer's motion to dismiss the petition is denied.

VI. CONCLUSIONS AND FINDINGS

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The Petitioner claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time, regular part-time, and per-diem Registered Nurses,¹² including Staff Nurses; Case Managers, and Charge Nurses, employed by the Employer at The Memorial Hospital of Salem County located at Woodstown Road, Salem, New Jersey, **excluding** all other employees, managers, guards, and supervisors as defined in the Act.

VII. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for the purposes of collective bargaining by **Health Professionals and Allied Employees (HPAE)**. The date, time, and place of the election will be specified in the Notice of Election that the Board's Regional Office will issue subsequent to this Decision.

A. Eligible Voters

The eligible voters shall be unit employees employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or were temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, employees engaged in an economic strike, which commenced less than 12 months before the election date, who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are

¹² RNs who worked an average of at least four hours per week during the 13-week period preceding the date of this Decision are eligible to vote in the election.

Lois Strang and Lori Narducci are excluded from the unit.

eligible to vote. Unit employees who are in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are: (1) employees who have quit or been discharged for cause after the designated payroll period for eligibility; (2) employees engaged in a strike who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees engaged in an economic strike which began more than 12 months before the election date who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized by unit. Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, One Independence Mall, 615 Chestnut Street, Seventh Floor, Philadelphia, Pennsylvania 19106 on or before **Monday, August 9, 2010**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by mail, facsimile transmission at (215) 597-7658, or by electronic filing through the Agency's website at **www.nlrb.gov**. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party. Guidance for electronic filing can be found under the **E-Gov** heading on the Agency's website. Since the list will be made available to all parties to the election, please furnish a total of 2 copies, unless the list is submitted by facsimile or electronic filing, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to 12:01 a.m. of the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on non-posting of the election notice.

VIII. RIGHT TO REQUEST REVIEW

Pursuant to the provisions of Section 102.67 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, a request for review of this Decision may be filed with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, DC 20570-0001.

Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, the request for review must be received by the Executive Secretary of the Board in Washington, DC by the close of business on **Monday, August 16, 2010, at 5:00 p.m. (ET)**, unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file a request for review electronically.** If the request for review is filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time on the due date.** Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of a request for review by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file.¹³ A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

¹³ A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.

Filing a request for review electronically may be accomplished by using the E-filing system on the Agency's website at www.nlrb.gov. Once the website is accessed, select the E-Gov tab and then click on the E-filing link on the pull-down menu. Click on the "File Documents" button under Board/Office of the Executive Secretary and then follow the directions. The responsibility for the receipt of the request for review rests exclusively with the sender. A failure to timely file the request for review will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Signed: August 2, 2010

A handwritten signature in dark ink, reading "Dorothy L. Moore-Duncan", is written over a horizontal line.

DOROTHY L. MOORE-DUNCAN

Regional Director, Region Four
National Labor Relations Board
615 Chestnut Street, 7th Floor
Philadelphia, PA 19106